IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Application No.4529 of 2006

DSL Enterprises Pvt. Ltd. & ors. Applicants
Vs.
Bank of India & ors. Respondents

Mr.V.V.Joglekar with Mr. L.Indorkar, Swati Deshpande and and Mr.Sahil Mahajan i/b. Shaunak Satpute & Co. for applicants.

Mr.A.V.Anturkar with Mr.S.B. Deshmukh for Resp.Nos.1 and 2.

Mr.Y.M.Nakhawa, APP for State.

CORAM: B.H.MARLAPALLE, J.

Reserved on : July 5, 2007.
Pronounced on : July 10, 2007.

P.C.

1. In this application filed under Section 482 of Cr.P.C. the applicants are praying for quashing and setting aside the order of process passed by the learned Judicial Magistrate, First Class at Pune in Criminal Case No.154 of 2003 (old No.461 of 2000) passed on 28/7/2000 for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (N.I. Act for short). It would be useful to set out the relevant facts before examining the merits of the case.

2. Applicant no.1-Company has been incorporated under the Companies Act, 1956 with its registered office at Datar Apartments, Vakilwadi, Nashik 422 001 and is engaged in the business of production and sale of various electronic equipments. It was formerly known as Datar Switchgears Ltd. The applicant no.1 had entered into an agreement of lease for its business and use shunt capacitors with M/s. Enarai Finance Ltd., Mumbai on 30/12/1994 and along with the said agreement the schedule of payment of rental charges was annexed. The first quarterly payment due towards the rental amount had commenced from 3rd April 1995 and it was at Rs.6,02,850/-. Due to certain disputes and differences between the parties Enarai Finance Ltd. issued a notice of termination dated 25/8/1997 through its Advocate at Mumbai. The Bank of India had granted a Cash Credit Facility of Rs.2 Crores to Enarai Finance Ltd. against the security of hypothecation of shunt capacitors and other assets and the said Bank is the Power of Attorney Holder of Enarai Finance Ltd., a Non Banking Financial Company incorporated under the Companies Act, 1956 with its registered office at Bhandup, Mumbai. (Power of Attorney executed on 17/11/1994).

The applicant no.1 - company had issued certain post dated cheques in favour of Enarai Finance Ltd. being the amount of lease rent due and payable in respect of the said shunt capacitors leased out to it and three cheques were of Rs.6,02,850/- each whereas the fourth cheque was for Rs.99,975/-. Initially the first two cheques were deposited and they were dishonoured and subsequently the remaining two cheques were also dishonoured. The cheque details are as under:

Sr.No.	Date	Cheque No.	Amount
1.	3.4.99	395006	6,02,850/-
2.	3.7.99	395007	6,02,850/-
3.	3.10.99	395008	6,02,850/-
4.	3.1.2000	395009	99,975/-

3. The statutory notice regarding the first two dishonoured cheques was issued on 19/7/1999 and Criminal Complaint No.3581 of 1999 has been filed against the same. Whereas dishonour of the third cheque is the subject matter of Criminal Case No.5301 of 1999. Writ Petition Nos.4530 and 4531 of 2006 arise from these two criminal cases. The subject matter of this application arises from the last cheque dated 3/1/2000 for an amount of Rs. 99,975/-. It was dishonoured as per the memo dated 8/1/2000 which was received by the complainant on 15/1/2000. The statutory notice under Section 142 of the N.I.Act was issued on 20/1/2000 and it was served on the accused on 23/1/2000. As the accused failed and neglected to pay the amount of the dishonoured cheque and other expenses within 15 days of the receipt, Criminal Case No.461 of 2000 (now Criminal Case No.154 of 2003) came to be filed on or about 10/2/2000 and the order of issuance of process under Section 204 of Cr.P.C. came to be passed on 28/7/2000.

4. The order of issuance of process dated 28/7/2000 came to be challenged by filing Revision Application under Section 397 of Cr.P.C. before the

Sessions Court on 8/1/2001 and the said revision was rejected on 11/11/2002 and this order was not challenged before this Court and, therefore, received its finality. It is further clear from the record that the applicants filed an application before the learned Magistrate for recalling of the order of process without challenging the order passed by the Revisional Court and the applicants claimed that they withdrew the said application in view of the law laid down in the case of Adalat Prasad Vs. Rooplal Jindal & ors. **[(2004) 7 SCC 338]**. Writ Petition No.1151 of 2004 came to be filed before this Court again challenging the very same order of issuance of process dated 28/7/2000. It appears that the order of issuance of process passed in two earlier complaints as referred to hereinabove was also challenged in Criminal Writ Petition Nos.1149 and 1150 of 2004.

5. All these three Criminal Writ Petitions came to be disposed by a common order dated October 25, 2005 by this Court holding that the remedy for the petitioners to challenge the order of process was before the Sessions Court by filing a revision application under Section 397 of Cr.P.C. as has been

held in the case of V.K. Jain & ors. Vs. Pratap V. Padode **[2005 (3) Mh.L.J.778]**. Liberty was, therefore, granted to the applicants to prefer revision applications before the concerned Sessions Court and the learned counsel for the petitioners had stated that such revision applications would be filed within six weeks. Based on this statement, this Court directed the trial Court not to proceed with the trial for a period of six weeks. It appears the learned counsel for the complainant made a statement before this Court that the matters would be argued solely on merits before the Sessions Court and the Sessions Court was directed to dispose off the matter on merits after hearing the parties. The applicants, therefore, in the second round filed three Criminal Revision Applications and all of them came to be dismissed by a common order dated 14/11/2006 passed by the learned Addl. Sessions Judge at Pune. Finally this petition has been filed on or about 20/12/2006 invoking the inherent powers of this Court under Section 482 of Cr.P.C. praying for quashing and setting aside the common order passed on 14/11/2006 dismissing the three revision applications as well as the order of process issued on 28/7/2000 in Criminal Complaint No.154 of 2003.

6. It was submitted by Mr.Joglekar, the learned counsel for the applicants that two legal issues were not raised in the earlier round of revision applications before the Sessions Court and in writ petitions before this Court. Firstly the consequences flowing from the termination of the agreement dated 30/12/1994 as per the Advocate's notice dated 25/8/1997 issued at the behest of M/s. Enarai Finance Ltd. If the agreement was terminated then there will not be any enforceable liability as contemplated under Section 43 of the N.I.Act. Consequently the Criminal Complaint No.154 of 2003 was required to be dismissed without trial and, therefore, there is a case made out to withdraw / recall the order of process dated 28/7/2000. In this regard reliance has been placed on the decision of the Kerala High Court in the case of Sudha Beevi Vs. State of Kerala **[2004 Cri.L.J. 3418]** and it was pointed out that the said decision of the learned Single Judge of the Kerala High Court was challenged in SLP (Criminal) No.4435 of 2004 and the same was dismissed on 24/3/2006 by the Supreme Court.

. Secondly it is contended that on 30/4/2004 and

16/5/2004 the applicants addressed letters to the Official Liquidator that the complainant was pressurising them to pay the alleged dues to Enarai Finance Ltd. and it further enquired as to whether the complainant-Bank was so authorised. The applicants rely upon the letter dated 3/6/2004 addressed by the Official Liquidator to the complainant - Bank. In short it is contended that on 26/4/1999 in Company Petition No.275 of 1998 this Court on its Original Side passed an order appointing the Official Liquidator as the Provisional Liquidator for M/s. Enarai Finance Ltd. in view of Sections 456 and 457 of the Companies Act, 1956 the complainant - Bank had no authority or legal status to file Criminal Case No.461 of 2000 (Now Criminal Case No.154 of 2003). It is further alleged that the complainant - Bank played a fraud on the Court by filing the said complaint for offence under Section 138 of the N.I. Act when the Official Liquidator was the sole custodian of the property of M/s. Enarai Finance Ltd. and the Bank could not act as the Power of Attorney of the said Non Banking Financial Company. As per the applicants, it is the Official Liquidator alone who has the authority to initiate any legal proceedings for recovery of debts after his

appointment on 26/4/1999 and in the instant case the criminal complaint having been filed thereafter, was a fraud on the Court in asmuchas the complainant - Bank did not disclose regarding the appointment of the Official Liquidator in Company Petition No.275 of 1998 made by this Court. Consequently the order of process issued on 28/7/2000 is required to be quashed and set aside, argued the learned counsel for the applicants. Lastly it is also contended that the dishonoured cheque was issued for security and, therefore, it would not come within the purview of Section 138 of the N.I. Act, by placing reliance on the decision of the Supreme Court in the case of M.S. Narayana Menon alias Mani vs. State of Kerala and anr. **[2006 (6) SCC 39]**.

7. Per contra Mr.Anturkar, the learned counsel for the complainant - Bank opposed the application on the preliminary points of law. He referred to the provisions of Section 397(3) of Cr.P.C. and pointed out that when the criminal revision application filed by the applicant no.1 - Company was dismissed on 11/11/2002, it could not have filed fresh criminal revision application in the second round before the Sessions Court or before this Court and the dismissal

of the first criminal revision application was perhaps not brought to the notice of this Court when Criminal Writ Petition Nos.1149, 1150 and 1151 of 2004 came to be disposed by the order dated 25/10/2005. Even otherwise criminal applications cannot be filed in piecemeal by contending that some legal issues were not agitated in the earlier round. The complainant alleged that the applicants are resorting to multiple proceedings to delay the trial of the criminal cases pending before the Chief Judicial Magistrate, First Class at Pune. On merits also it was contended by Mr.Anturkar that no case has been made out to entertain this application on the so called new or additional pleas set out hereinabove. The learned counsel further submitted that the order passed by this Court on 25/10/2005 disposing of Writ Petition Nos.1149 to 1151 of 2004 cannot be read so as to amend the provisions of Section 397(3) of Cr.P.C. even though there appears to be some element of consent purportedly given by the learned Advocate for the Respondent No.1 - Bank in the said order for filing criminal revision applications in the second round and to be decided on merits by the Sessions Court.

8. Section 397(3) of Cr.P.C. reads as under:

> "(3) If an application under this section has been made by any person either to the High Court to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

An applicant having filed a revision application under Section 397 before the Sessions Court is prevented from filing a second revision application before the High Court. Such a second revision application was not presented by the applicants before this Court at any time after the first revision application was dismissed by the Sessions Court on 11/11/2002 against the order of process dated 28/7/2000. As noted earlier in the first round Writ Petition Nos.1149 to 1151 of 2004 came to be filed before this Court under Article 227 of the Constitution read with Section 482 of Cr.P.C. and in the second round in this application the applicants have invoked the powers of this Court under Section 482 of Cr.P.C. rather than filing writ petition under Article 227 of the Constitution read with Section 482 of Cr.P.C. From the reading of the order

dated 25/10/2005 passed by this Court disposing of Writ Petition Nos.1149 to 1151 of 2004 it does not appear that this Court was made aware of the applicants' earlier revision applications having been rejected on 11/11/2002 and, therefore, the liberty granted by this Court in the said order to approach the Sessions Court for the relief of quashing of the order of issuance of process cannot be termed to mean that this Court impliedly held that the applicants could approach the very same Sessions Court in the second round by filing fresh revision applications. By reading conjointly the scheme of Section 397(3) and 399(3) of Cr.P.C., it was tried to be submitted on behalf of the respondent no.1 that the second revision application by the very same Court i.e. the Sessions Court could not be entertained. I need not deal with this issue in this application, more so when the order dated 25/10/2005 had granted liberty to the applicants to approach the Sessions Court by filing a criminal revision application under Section 397 of Cr.P.C. and such an issue could be left open for decision in an appropriate case.

9. The first ground raised by the applicants is regarding the effect of the Advocate's notice dated

25/8/1997 terminating the agreement dated 30/12/1994 on behalf of M/s.Enarai Finance Ltd. As rightly contended by Mr.Anturkar, the learned counsel for the Bank, the very same issue was available to be taken by the applicants in the very first round of revision applications filed before the Sessions Court and it was not a ground which did not exist when the applicants approached the Sessions Court on 8/1/2001. The legal issues available to challenge the order of process cannot be allowed to be taken on piecemeal basis by approaching the revision Court from time to time. It could be safely presumed that when the revision application was filed agitating some legal and factual issues, the other such issues were dropped or the challenge to the same was given up voluntarily and/or for reasons known to the applicants. If such piecemeal challenges are allowed to be taken against the order of process by filing revision applications from time to time, it would be unending and the trial of the complaint pending before the learned Magistrate would be inordinately delayed and the accused may resort to such steps to perpetuate their actions by defrauding the payee by delaying the trial of the case. Even otherwise in the said legal notice it was clearly spelt out that

the applicants owed an amount of Rs.1,37,89,842/- to the respondent no.1 - Bank together with interest thereon at the agreed rates and the applicants were called upon to pay the same within 14 days from the receipt of the notice. In my considered opinion, therefore, this ground based on the legal notice dated 25/8/1997 terminating the agreement cannot be allowed to be agitated in the second revision application.

10. Now I will consider the second issue regarding the consequences of appointment of Official Liquidator by this Court on 26/4/1999 in Company Petition No.275 of 1998. Sections 456 and 457 of the Companies Act, 1956 read as under :

> "**456. Custody of company's property** : (1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(1A) For the purpose of enabling the liquidator or the provisional liquidator, as the case may be, to take into his custody or under his control, any property, effects or actionable claims to which the company is or appears to be entitled, the liquidator, or the provisional liquidator, as the case may be, may by writing request the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effects or actionable claims or any books of account or other documents of the company may be found, to take possession thereof, and the Chief Presidency Magistrate or the District Magistrate may thereupon after such notice as he may think fit to give to any party, take possession of such property, effects, actionable claims, books of account or other documents and deliver possession thereof to the liquidator or the provisional liquidator.

(1B) For the purpose of securing compliance with the provisions of sub-section (1A), the Chief Presidency Magistrate or the District

Magistrate may take or cause to be taken such steps and use or cause to be used such force as may in his opinion be necessary.

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.

457. Powers of liquidator - (1) The liquidator in a winding up by the Court shall have power, with the sanction of the Court, -

(a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to

transfer the whole thereof to any person or body corporate, or to sell the same in parcels;

(d) to raise on the security of the assets of the company any money requisite;

(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(2) The liquidator in a winding up by the Court shall have power -

(i) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

(ia) to inspect the records and returns of the company on the files of the Registrar without payment of any fee;

(ii) to prove, rank and claim in the

insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(iii) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(iv) to take out in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from an contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the

letters of administration or recover the money, be deemed to be due to the liquidator himself:

Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General;

(v) to appoint an agent to do any business which the liquidator is unable to do himself.

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of the powers conferred by this section."

. There is no doubt that the Criminal Case No.461 of 2000 has been filed after the appointment of the Official Liquidator on 26/4/1999 by the Respondent No.1-Bank as the Constituted Attorney of M/s. Enarai Finance Ltd. As per Mr.Joglekar, the

dishonoured four cheques which were in the custody of the Respondent No.1 as the Constituted Attorney were the property of M/s. Enarai Finance Ltd. and it was only the Official Liquidator who could have initiated steps as contemplated under Section 138 of the N.I. Act. and the Bank could not have taken such steps. The date of the first cheque is 3/4/1999 whereas the date of the remaining three cheques is after 26/4/1999. The applicants do not dispute that these four cheques were already in possession of the respondent no.1 - Bank as the Constituted Attorney of M/s. Enarai Finance Ltd. The Official Liquidator has a statutory duty to be performed within the meaning of Sections 456 and 457 of the Companies Act, 1956. On his taking over the properties, liabilities and actionable claims of M/s. Enarai Finance Ltd., he is required to take due steps to discharge the legal functions including the steps to be taken for recovery of financial dues arising out of the contractual obligations. He was, therefore, not estopped from applying to the learned Judicial Magistrate, First Class for being substituted as the complainant in place of the respondent no.1 and such an option is available to him even now or any time during the trial of the criminal complaint. The

respondent no.1 being a nationalised bank and the constituted attorney of M/s. Enarai Finance Ltd., cannot be blamed or cannot be attributed any motives for filing the criminal complaint against the applicants for the offence punishable under Section 138 of the N.I. Act and it must be credited for acting in time as the custodian of the public funds. The complaint filed by the respondent no.1 in its capacity as the constituted attorney, by no stretch of imagination, could be quashed and set aside by invoking the inherent powers under Section 482 of Cr.P.C. only on the ground that it was not filed by the Official Liquidator who was appointed prior to the filing of the complaint. It would be unsafe to invoke the inherent powers under Section 482 of Cr.P.C. to concede to such a prayer and quash and set aside the criminal complaints punishable for an offence under Section 138 of the N.I. Act. The law laid down in the case of Krishnan v. Krishnaveni **[(1997) 4 SCC 241]** certainly assists the applicants' case to approach this Court under Section 482 of Cr.P.C. even after the revision applications filed by it were dismissed earlier. The Apex Court observed in the said case as under:

"Though the revision before the High Court under sub-section (1) of Section 397 is prohibited by sub-section (3) thereof, inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the courts below."

. In the case of Rajathi v. C. Ganesan **[(1999) 6 SCC 326]** it has been laid down that the power under Section 482 of the Cr.P.C. has to be exercised sparingly and such power shall not be utilised as a substitute for second revision. Ordinarily, when a revision has been barred under Section 397(3) of the Code, the complainant or the accused cannot be allowed to take recourse to revision before the High Court under Section 397(1) of the Cr.P.C. as it is prohibited under Section 397(3) thereof. However, the High Court can entertain a petition under Section 482 of the Cr.P.C. when there is a serious miscarriage of justice and abuse of the process of

the court or when mandatory provisions of law are not complied with and when the High Court feels that the inherent jurisdiction is to be exercised to correct the mistake committed by the revisional court.

. In the instant case the allegations that the Respondent No.1-Bank played a fraud on the Court of the learned Judicial Magistrate, First Class in filing the criminal case against the applicants on 10/2/2000 is ill-founded and as noted earlier, the Official Liquidator has every right / power to apply to the learned Judicial Magistrate, First Class for being substituted as the complainant in place of the respondent no.1 by placing before the said Court the necessary documents in support of such application. When the respondent no.1 can be substituted by the Official Liquidator as the complainant against the applicants, it cannot be said that the applicants have made out a case of miscarriage of justice against them so as to invoke the inherent powers under Section 482 of Cr.P.C. and quash and set aside the criminal case pending before the learned Judicial Magistrate, First Class.

11. In the case of S.M.S. Pharmaceuticals Ltd.

vs. Neeta Bhalla & anr. **(2007) 4 SCC 70]**, Their Lordships held, inter alia, as under:

> "In terms of Section 138 of the Act, a complaint petition alleging an offence thereto must demonstrate that the following ingredients exist that :
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> (i) a cheque was issued;
>
> (ii) the same was presented;
>
> (iii) but, it was dishonoured;
>
> (iv) a notice in terms of the said provision was served on the person sought to be made liable; and
>
> (v) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice."

. For a complaint punishable under Section 138 of the N.I. Act when the above ingredients have been

made out for the prima facie consideration of issuance of the order of process, the complaint has to proceed for trial on merits and whether the cheques were issued by way of security or they were issued for discharge of any debt or other liability are the issues which will have to be decided on the basis of the evidence that may be adduced by the parties during the trial of the case.

12. There is one more issue which has been highlighted by the learned counsel for the respondent no.1 - Bank, that is regarding the limitation to file the revision application in the second round by the applicants. Article 131 of the Limitation Act, 1963 prescribes the period of 90 days as the limitation for filing revision application under the Code of Civil Procedure or the Code of Criminal Procedure, from the date of the decree or order or sentence sought to be revised and as per Section 3 of the said Act, an application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. In the instant case the first revision application, as noted hereinabove, came to be filed on 8/1/2001 and it was rejected / disposed on 11/11/2002. It was submitted that the liberty

granted cannot be termed to give a go-bye to the provisions of Section 3 read with Article 131 of the Limitation Act,1963. This is an additional legal handicap which would come in the way of the revision applicant like the present petitioners in filing revision after revision on piecemeal basis purportedly on new legal grounds and such a tendency deserves to be curbed, urged the learned counsel. There is no doubt that the revision applications filed by the present applicants in the second round before the Sessions Court under Section 397 of Cr.P.C. were beyond limitations, but the directions of this Court in its order dated 25/10/2005 to hear and decide the revision applications on merits, required the Sessions Court to decide the applications on merits and on the concession purportedly given by the learned Advocate for the respondent no.1 - Bank by way of consenting the revision applications to be decided on merits. The Respondent No.1, therefore, cannot agitate the issue of limitation in entertaining the second revision application now. However, it must be stated that while entertaining such piecemeal revision application the issue of limitation would bar the application in ordinary course and that could be an

additional ground to curb the tendency of filing such applications repeatedly.

13. In the premises there is no case made out by the applicants so as to quash the Criminal Case No.154 of 2003 presently pending before the learned Judicial Magistrate, First Class at Pune for the offence punishable under Section 138 of the N.I. Act, by invoking the inherent powers of this Court under Section 482 of Cr.P.C. and hence this application must fail at the threshold. The same is hereby rejected summarily. Ad-interim relief stands vacated.

. Mr. Joglekar submitted an oral application to continue the ad-interim relief for a period of eight weeks from today. Oral application is hereby rejected.

(B.H.MARL